

**FILED**  
8:32 O'Clock A.M.

JUN 01 2011

SANDRA K. MARKHAM, Clerk  
By Stephanie Kling

BRAD D. BRIAN (CA Bar No. 079001, *pro hac vice*)  
Brad.Brian@mto.com  
LUIS LI (CA Bar No. 156081, *pro hac vice*)  
Luis.Li@mto.com  
TRUC T. DO (CA Bar No. 191845, *pro hac vice*)  
Truc.Do@mto.com  
MIRIAM L. SEIFTER (CA Bar No. 269589, *pro hac vice*)  
Miriam.Seifter@mto.com  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue, Thirty-Fifth Floor  
Los Angeles, CA 90071-1560  
Telephone: (213) 683-9100

THOMAS K. KELLY (AZ Bar No. 012025)  
tskelly@kellydefense.com  
425 E. Gurley  
Prescott, Arizona 86301  
Telephone: (928) 445-5484

Attorneys for Defendant JAMES ARTHUR RAY

SUPERIOR COURT OF STATE OF ARIZONA  
COUNTY OF YAVAPAI

STATE OF ARIZONA,  
  
Plaintiff,  
  
vs.

JAMES ARTHUR RAY,  
  
Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S  
(1) REQUEST FOR IN CAMERA  
REVIEW; (2) MOTION TO STRIKE  
TESTIMONY OF MARK ROCK**

Defendant James Arthur Ray, by and through undersigned counsel, hereby requests an *in camera* review of the affidavit of appointed attorney Robert Launder and moves to strike the testimony of witness Mark Rock. This motion is supported by the following Memorandum of Points and Authorities.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Mark Rock's testimony cannot proceed and must be stricken. Mr. Rock's appointed  
4 counsel, Robert Launders, has advised Mr. Rock not to testify. The apparent basis of this advice  
5 is that Mr. Rock is "determined to perjure [himself]," and statutory use immunity does not protect  
6 an individual from prosecution based on perjury. *See* Draft Transcript of Status Conference,  
7 5/31/11, at 10:8-16 (MR. LAUNDERS: "Let me interject one thing for my client who doesn't  
8 want to listen to his lawyers advise. The use immunity does not cover a witness who somebody  
9 figures has perjured themselves. . . . The use immunity that the state can provide this witness  
10 encompasses a great deal. But it does not encompass someone who is determined to perjure  
11 themselves."). Permitting Mr. Rock to testify irrespective of the likelihood of perjury, and  
12 without reviewing Mr. Launders' affidavit, invites two clear-cut violations of Mr. Ray's Due  
13 Process rights.

14 *First*, the government's use of perjured evidence to secure a conviction violates the Due  
15 Process Clause. *See, e.g., Napue v. Illinois*, 360 U.S. 264 (1959); *Pyle v. Kansas*, 317 U.S. 213  
16 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935). This is true even where the Government lacks  
17 definitive knowledge that the testimony will be false; a Due Process violation occurs if the  
18 prosecutor had reason to know the testimony would be false. *See, e.g., Hovey v. Ayers*, 458 F.3d  
19 892, 916 (9th Cir. 2006) (Due Process violation occurs if prosecution "knew or should have  
20 known that the testimony was actually false"). Given the strong indication that Mr. Rock will  
21 provide false testimony, the Due Process Clause obligates this Court and the County Attorney to  
22 determine whether Mr. Rock's testimony will be false before permitting him to testify.

23 *Second*, Mr. Launders' sealed affidavit likely contains *Brady* material—evidence that  
24 tends to exonerate Mr. Ray by impeaching the credibility of Mr. Rock, the government's witness.  
25 The Court is obligated to review the sealed filing to determine whether the evidence is  
26 exculpatory. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987), *infra* (Due Process  
27 requires *in camera* inspection of confidential documents alleged to contain exculpatory material).

1 In addition, Mr. Launders' affidavit may reveal whether the exculpatory information was within  
2 the State's possession prior to the State's disclosure of it at sidebar on May 27.

3 In addition, there is no interest weighing *against* judicial review of the sealed affidavit.  
4 Review of Mr. Launders' affidavit would not prejudice the State or Mr. Rock. Nor would judicial  
5 review violate the attorney-client privilege. *See, e.g., United States v. Hamilton*, 128 F.3d 996  
6 (6th Cir. 1997). Given the potential for constitutional error and the absence of competing  
7 interests, this Court must safeguard Mr. Ray's Due Process rights by reviewing the sealed filing  
8 and, if perjury is likely, striking Mr. Rock's testimony in its entirety.

## 9 **II. ARGUMENT**

### 10 **A. The State Will Violate Mr. Ray's Due Process Rights If It Elicits False** 11 **Testimony From Mr. Rock.**

12 It is black-letter law that the Government's knowing use of false evidence, or the failure to  
13 correct false evidence, violates Due Process. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "To  
14 prevail on a *Napue* claim, the petitioner must show that '(1) the testimony (or evidence) was  
15 actually false, (2) the prosecution knew or should have known that the testimony was actually  
16 false, and (3) ... the false testimony was material.'" *Hovey v. Ayers*, 458 F.3d 892, 916 (9th Cir.  
17 2006) (quoting *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc)). As the foregoing  
18 authority indicates, the State need not have actual knowledge that the testimony is false; it is  
19 enough if the prosecution had reason to know. *See id.*<sup>1</sup> For purposes of deciding whether false  
20 testimony requires mistrial or reversal, "the fact that testimony is perjured is considered material  
21 unless failure to disclose it would be harmless beyond a reasonable doubt." *United States v.*  
22 *Bagley*, 473 U.S. 667, 680 (1985).

23 In this case, the State already has, at the least, compelling reason to believe Mr. Rock's  
24 testimony will include false statements. Mr. Launders stated on the record that he had advised Mr.  
25 Rock to "exercise his fifth amendment rights and refuse the use immunity the State is offering  
26

---

27 <sup>1</sup> The County Attorney's ethical obligations, as a prosecutor and member of the bar, reinforce the  
28 impermissibility of eliciting false testimony. *See* Ethical Rules 3.3 (Candor Toward the Tribunal); 3.4  
(Fairness to Opposing Party and Counsel); 3.8 (Special Duties of Prosecutor).

1 him,” because use immunity “does not encompass someone *who is determined* to perjure  
2 themselves.”). Draft Transcript of Status Conference, 5/31/11, at 4:10–13, 10:8–16 (emphasis  
3 added). Mr. Launders’ filed affidavit may well confirm the perjury that his on-the-record  
4 statement strongly suggests.

5 Under these circumstances, the Court must not force Mr. Ray to await possible appellate  
6 review to determine whether the State will violate Mr. Ray’s Due Process rights by eliciting false  
7 testimony. Review at this time is especially critical because Mr. Rock’s testimony is highly  
8 material; given that Mr. Rock is the *only* witness inside the sweat lodge to testify that Mr. Ray  
9 heard and responded to statements that Ms. Brown needed aid, the State will not be able to prove  
10 beyond reasonable doubt that its introduction of Mr. Rock’s false testimony was harmless.  
11 Permitting Mr. Rock to testify thus places this entire four-month proceeding at risk. There is no  
12 reason to incur this risk, and to jeopardize Mr. Ray’s Due Process rights, when the Court has the  
13 ability now to make a determination that would head off at the pass the potential constitutional  
14 error.<sup>2</sup>

15 **B. The Court Must Review Mr. Launders’ Affidavit To Determine Whether It**  
16 **Contains Exculpatory Information.**

17 To the extent Mr. Launders’ affidavit contains information that impeaches Mr. Rock’s  
18 credibility, that information is exculpatory within the meaning of *Brady v. Maryland*. See  
19 generally *Giglio v. United States*, 405 U.S. 150 (1972) (evidence that impeaches witness  
20 credibility falls within *Brady* rule). The fact that the evidence is contained in a privileged  
21 document does not permit the Court to refuse *in camera* review. To the contrary, the Due Process  
22 Clause *requires* a court to conduct *in camera* inspection of documents that may contain  
23 exculpatory information where a legal privilege prevents the parties from reviewing the  
24 documents directly. In *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987), the United States  
25 Supreme Court held that a defendant was entitled to have a confidential Children and Youth  
26 Services file “reviewed by the trial court to determine whether it contain[ed]” material,

27 <sup>2</sup> If judicial review indicates that Mr. Rock perjured himself in November 2010, the matter should be  
28 referred to the State Attorney General for evaluation and potential prosecution.

1 exculpatory information, where a state statute prohibited public disclosure of the file. Following  
2 *Ritchie*, federal courts have held that “the constitutional obligation imposed by *Ritchie* is one  
3 imposed upon the state, which means upon the judge as well as all other state actors involved in  
4 the process of insuring in camera inspection of evidence sufficiently shown, under *Ritchie*, to be  
5 subject to that inspection.” *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995). In *Love*, the  
6 prosecution turned over potentially exculpatory material but the district court refused to review it  
7 *in camera*, and the Fourth Circuit held that the court’s refusal violated *Brady*. *See also United*  
8 *States v. Trevino*, 89 F.3d 187, 190 (4th Cir. 1996) (“Once the accused has made a plausible  
9 showing that the evidence would be both material and favorable, the trial court must review the  
10 information in camera to ascertain its true nature and determine whether it must be disclosed.”).

11 In this case, the appropriate course is for the Court to review Mr. Launders’ affidavit and  
12 determine whether Mr. Rock’s testimony raises concerns under *Brady* or other Due Process  
13 requirements.

14 **C. No Interests Weigh Against Judicial Review of the Launders Affidavit.**

15 There is no countervailing interest that weighs against judicial review of Mr. Launders’  
16 affidavit. Judicial review will not prejudice Mr. Rock or the State of Arizona. Furthermore,  
17 neither Mr. Launders’ filing of his affidavit with the Court nor the Court’s review of the affidavit  
18 would violate the attorney-client privilege. To the contrary, Arizona’s Ethical Rules *require* such  
19 a filing and review. *See, e.g.,* Ariz. Ethical R. 3.3(b) (Candor Toward the Tribunal) (“A lawyer  
20 who represents a client in an adjudicative proceeding and who knows that a person intends to  
21 engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding  
22 shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”); *id.*  
23 3.4 (Fairness to Opposing Party and Counsel) (“A lawyer shall not . . . “assist a witness to testify  
24 falsely.”). *See also Hamilton*, 128 F.3d at 999–1000 (former attorney’s sealed filing stating belief  
25 that client would commit perjury if he testified did not violate attorney-client privilege).<sup>3</sup>

26 <sup>3</sup> In *Hamilton*, the Sixth Circuit further opined that it was improper for the trial court to preclude the  
27 defendant’s testimony based on the sealed filing without holding a hearing, because the former attorney’s  
28 filing was hearsay, and there was no reason to believe she was unavailable to testify. *See Hamilton*, 128  
F.3d at 1000. To the extent the Court has similar concerns in this case, the Court could conduct a sealed  
evidentiary hearing.

1     **III.   CONCLUSION**

2             The Court *must* review Mr. Launder's affidavit to determine conclusively whether Mr.  
3     Rock's testimony rests on perjury or contains *Brady* information. No countervailing interest  
4     counsels against judicial review, and the Due Process Clause requires it. If the Court cannot rule  
5     out these possible constitutional violations, the Court must preclude further testimony from Mr.  
6     Rock and strike the testimony he has given to date, which has not been subject to cross-  
7     examination.

8  
9     DATED: June 1, 2011

MUNGER, TOLLES & OLSON LLP  
BRAD D. BRIAN  
LUIS LI  
TRUC T. DO  
MIRIAM L. SEIFTER

12            THOMAS K. KELLY

13  
14            By: 

Attorneys for Defendant James Arthur Ray

15  
16     Copy of the foregoing delivered this 1st day  
17     of June, 2011, to:

18     Sheila Polk  
19     Yavapai County Attorney  
20     Prescott, Arizona 86301

21     by 